

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA *ex rel.*
CRAIGO REAL ESTATE CORPORATION,
a West Virginia corporation,**

Petitioner,

v.

CIRCUIT COURT CASE No. 04-C-40

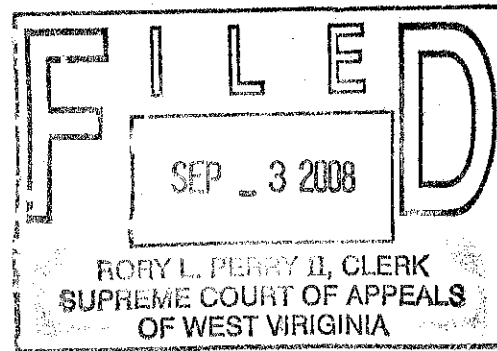
**THE HONORABLE N. EDWARD EAGLOSKI,
Judge of the 29th Judicial Circuit,**

Respondent.

**MEMORANDUM OF LAW
CITING RELEVANT AUTHORITIES**

Submitted By:

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MEMORANDUM OF LAW
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Craigo Real Estate Corporation, by counsel, submits this memorandum of law in support of its petition for writ of mandamus filed pursuant to Rule 14 of the *West Virginia Rules of Appellate Procedure*. This Court should issue a rule to show cause to compel Judge N. Edward Eagloski, Jr., of the Circuit Court of Putnam County, West Virginia, to comply with the mandatory provisions of Rule 17.01 (b) of the *West Virginia Trial Court Rules*.

Statement of Facts

Craigo Real Estate Corporation is a defendant in a condemnation suit pending in the Circuit Court of Putnam County, West Virginia. Judge N. Edward Eagloski, Jr. has been the presiding judge in that case since it was filed in the year 2004. Judge Eagloski ordered the case to mediation. During mediation a settlement was agreed upon by all of

the parties. Judge Eagloski declined to enter the agreed settlement order, even though it had been endorsed by all of counsel and contained nothing more than the standard provisions set forth in a final order in a condemnation case.

When counsel for Craig Real Estate Corporation inquired of the judge about his failure to enter the agreed final order, Judge Eagloski made remarks to counsel indicating an apparent bias against Craig Real Estate Corporation because its primary shareholder and president was at one time a prominent public figure in Putnam County, West Virginia. The judge questioned the integrity of all parties in agreeing to a settlement in the case, implied that Craig Real Estate Corporation had acted upon improper insider information, and voiced an opinion that the amount of the agreed upon settlement was excessive in the court's opinion. Based upon the judge's apparent bias, counsel for Craig Real Estate Corporation filed a motion pursuant to Rule 17.01 of the *West Virginia Trial Court Rules* to disqualify Judge Eagloski from any further proceedings in the case. This motion for disqualification was filed in Putnam County on July 29, 2008. On that same day a true copy of the motion, together with the attachments required by Rule 17.01, was hand delivered to Judge Eagloski's office. Copies of the motion were properly served on opposing counsel and unrepresented parties. The motion for disqualification was filed more than twenty-one (21) days in advance of the day that had been previously set by order for the trial of the condemnation case.

More than thirty (30) days have now elapsed since Craig Real Estate Corporation's Rule 17.01 motion for disqualification was filed in Putnam County and a

true copy thereof delivered to the office of Judge Eagloski. As of this date, Judge Eagloski has, to the best of counsel's knowledge, failed to take any action in accordance with the provisions of Rule 17.01 (b). He has not forthwith forwarded a copy of said motion to the Chief Justice of this Court nor has he penned a letter to the Chief Justice and provided copies of such a letter to counsel stating his response to the motion. The judge has simply chosen to ignore the mandatory duties imposed upon him by Rule 17.01; he has continued the same course of inactivity that helped precipitate the filing of the disqualification motion in the first place.

Points and Authorities Relied On

West Virginia Constitution, Article 3 Section 17.

Patterson v. Aldredge, 173 W.Va. 446, 317 S.E.2d 805 (1984).

Perry v. Miller, 166 W. Va. 138, 272 S.E.2d 678 (1980).

State ex rel. Judy v. Kiger, 153 W. Va. 764, 767-68, 172 S.E.2d 579, 581 (1970).

State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969).

State ex rel. Cackowska v. Knapp, 147 W. Va. 699, 130 S.E.2d 204 (1963).

Vineyard v. Roane County Court, 92 W. Va. 51, 114 S.E.2d 380 (1922).

West Virginia Code of Judicial Conduct, Canon 3 (B) (8).

West Virginia Code of Judicial Conduct, Canon 3 (E) (1).

West Virginia Trial Court Rules, Rule 17.01.

Argument

Rule 17.01 (b) of the West Virginia Trial Court Rules provides that when a motion for disqualification is filed more than twenty-one (21) days in advance of the date set by order for a trial, the circuit judge whose disqualification is sought **shall**, regardless of whether he or she finds good cause and agrees with the disqualification motion, **forthwith** transmit a copy of the motion and accompanying counsel certificate to the Chief Justice of the West Virginia Supreme Court of Appeals. This forthwith transmission from the circuit judge to the Chief Justice is to be accompanied by a letter stating the judge's response to the motion for disqualification and the reasons therefor. The circuit judge is further required to make a copy of this letter a part of the record and to file the same in the office of the circuit clerk with copies to counsel of record and any unrepresented party. In complying with these provisions of Rule 17.01, circuit courts are governed by the provisions of *West Virginia Constitution, Article III, section 17*, which provides that "... justice shall be administered without sale, denial or delay." The circuit court must also operate within the parameters of Canon 3 (B)(8) of the *West Virginia Code of Judicial Conduct* providing that a judge "... shall dispose of all judicial matters promptly, efficiently, and fairly."

Judge Eagloski's duties under Rule 17.01 (b) are mandatory and not discretionary. The rule specifically provides that the judge "**shall**" perform the actions set forth in the rule. As this Court has held many times, the word "shall" means just what it says -- "shall" not "may." *Perry v. Miller*, 166 W. Va. 138, 272 S.E.2d 678 (1980).

It is Judge Eagloski's mandatory duty to "**forthwith**" transmit Craig Real Estate Corporation's motion for disqualification and accompanying certificate to the Chief Justice of this Court, together with a letter stating the judge's response to the motion and the reasons therefor. The construction of the term "forthwith" as applied to public officers has usually been construed to mean within a reasonable time, in the reasonable course of the orderly conduct of the business of the office, with all reasonable dispatch, but always to be manifested by the circumstances and the nature of the duty to be performed. *Vineyard v. Roane County Court*, 92 W. Va. 51, 114 S.E.2d 380 (1922). In the instant case, the nature of the duty to be performed by the circuit judge is of the highest order. The integrity of the judiciary depends upon the confidence of litigants in the fairness of their elected judges. When one litigant perceives a reasonable basis to question a presiding judge's impartiality, it is of the utmost importance that such issue be addressed with urgency and a sense of immediacy. Judge Eagloski's delay in excess of thirty (30) days in performing his duties under Rule 17.01 is unreasonable as a matter of law.

Judge Eagloski's failure to perform his mandatory duty has led to an intolerable situation. The petitioner entered into a settlement agreement in May 2008 to resolve the issue of title to its real property and its just compensation for the taking of a part of that property by the State of West Virginia. A final order carrying out that settlement was delivered to the office of a circuit judge on June 18, 2008. When that circuit judge declined to sign the order for a period of twenty-one (21) days, an inquiry was made to his office. The circuit judge then made comments to one of counsel which gave rise to a

reasonable question of the judge's impartiality to further preside in the matter. A motion for disqualification of the judge was filed and the judge has now delayed more than thirty (30) days in performing any of his mandatory duties relative to that motion. The net result is that the petitioner has been deprived for almost four months of the just compensation for its property to which it is constitutionally entitled. Nothing has happened to give the petitioner any indication that relief from this intolerable delay is anywhere in sight. If the petitioner is going to have to litigate its cause further in front of the present presiding judge, it has a right to know that. If the present judge is to be disqualified and another judge assigned to this case, then the petitioner has an equal right to know that. The petitioner has a right to expect a presiding judge to perform his mandatory duties. The petitioner knows of no other adequate remedy to redress the harm that it continues to suffer other than to seek an order compelling the presiding judge to do his duty. *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). This Court cannot order the judge to disqualify himself, but he certainly may be compelled to act in accordance with Rule 17.01 so the issue of his disqualification can be resolved. *Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984); *State ex rel. Judy v. Kiger*, 153 W. Va. 764, 767-68, 172 S.E.2d 579, 581 (1970); *State ex rel. Cackowska v. Knapp*, 147 W. Va. 699, 130 S.E.2d 204 (1963). The duty of the Circuit Court of Putnam County to act is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance. The proper means to compel the performance of the respondent's duty is through mandamus.

Prayer for relief

The Circuit Court of Putnam County, West Virginia, the Honorable N. Edward Eagloski, Jr., presiding, has now delayed for a period of time in excess of thirty (30) days in transmitting to the Chief Justice of this Court a copy of a properly filed motion for disqualification pursuant to Rule 17.01 of the *West Virginia Trial Court Rules*. The petitioner's right to mandamus under the circumstances is clear, and a rule to show cause should be issued out of this Court directing the respondent judge to appear and show cause, if any he has, why a writ of mandamus should not be awarded.

Respectfully submitted this 2nd day of September, 2008.

STATE OF WEST VIRGINIA *ex rel.*
CRAIGO REAL ESTATE CORPORATION,
a West Virginia corporation,

By counsel



Harvey D. Peyton, Esquire (#2890)

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Counsel for Craigo Real Estate Corporation

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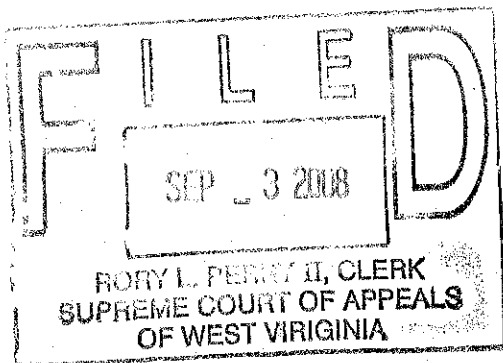
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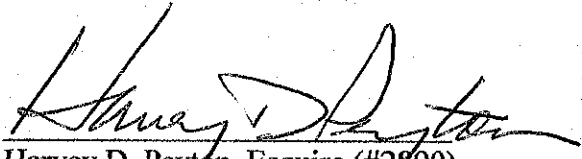
**MEMORANDUM LISTING NAMES AND ADDRESSES OF THOSE
PERSONS UPON WHOM RULE TO SHOW CAUSE IS TO BE SERVED**

Pursuant to Rule 14, *West Virginia Rules of Appellate Procedure*, the petitioner, Craigo Real Estate Corporation, lists the following names and addresses of those persons upon whom a rule to show cause is to be served, if granted:

1. Honorable N. Edward Eagloski, Judge
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213
2. Eric B. Hudnall, Esquire
Division of Highways, Legal Division
Building Five, Room 519
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0430
3. Mr. John Alderman, Esq.
City National Bank
308 Goff Mountain Road
Cross Lanes, WV 25313



CRAIGO REAL ESTATE CORPORATION
BY COUNSEL


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CERTIFICATE OF SERVICE

I, Harvey D. Peyton, counsel for the Petitioner, the Putnam County Development Authority, do hereby certify that I have this 3rd day of September, 2008, served copies of the foregoing *Petition for Writ of Mandamus, Memorandum of Law Citing Relevant Authorities, and Memorandum Listing Names and Addresses of Those Persons Upon Whom Rule To Show Cause Is To Be Served*, by first class United States Mail, postage prepaid, to the following:

Honorable N. Edward Eagloski, Judge
Circuit Court of Putnam County
Putnam County Judicial Building
3389 Winfield Road
Winfield, WV 25213

Mark Sorsaia, Esq.
Putnam County Prosecuting Attorney
Putnam County Judicial Building
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Division of Highways, Legal Division
State Capitol Complex
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Mr. John Alderman, Esq.
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308 Goff Mountain Road
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